

How to reduce your procurement risks



Procurement proofing package development deals

No development deal can be ‘procurement proof’ if one party is subject to public procurement law. But there are ways and means of substantially reducing these risks to the success of the deal.

In developments a ‘package deal’ is where a private sector developer approaches a ‘contracting authority’ who is governed by public procurement law, such as a council or registered provider of social housing, with an opportunity with a view to the developer undertaking development work and the contracting authority either operating as the

funder, eventual land owner, tenant or a mixture of all three.

Whether you are a developer with the package, or the contracting authority being offered the package deal, we can help you achieve your commercial aims. Our real estate and procurement law experts have worked with both contracting authorities and developers on a wide variety of package deals. We provide the insight you require to manage risks effectively throughout every stage of the deal.

Does public procurement law apply?

First, you need to determine if public procurement law, in the form of the Public Contracts Regulations 2015 or one of its counter-parts for utilities or concession arrangements, applies to your deal.

We can assess whether:

- The nature of the deal would be considered as ‘works’ for public procurement law.
- The proposed contract documents would fulfil all the criteria to be a ‘public works contract’.
- If the contract is a public works contract, if any practical measures could be made to stay outside of public procurement law without triggering the anti-avoidance measures.





Is an exemption available?

If public procurement law applies, package deals are usually at odds with the requirements of the law.

There are, however, a number of exemptions available. These are tightly drawn and must be considered carefully to the facts of every deal.

We can assist by:

- Considering if the deal could fall into the land exemption. The more risk and initiative the developer takes, the more likely it becomes that the deal could fall into this exemption.

We would apply the lessons from the Faraday case to assess whether this exemption could be relied upon.

- Assessing whether the deal could benefit from the 'exclusive rights exemption'. This allows a contracting authority to bypass tendering and negotiate with one party to protect exclusive rights held by the other party, in this case the developer. The ownership of land and pre-existing letting agreements are helpful in establishing this exemption,

but it is subject to multiple criteria and tightly drawn. We can assess its availability.

- Considering if any other exemptions, such as emergency or technical matters could be relied upon. Again, each exemption has its own checklist for applicability.
- Advising on the practical steps you need to take for each exemption. This includes the issue of appropriate notices in the OJEU/UK Find a Tender Service (FTS) to mitigate risk.

Practical steps

We can consider practical issues around the deal to mitigate risk.

We can advise on what other deals did to avoid or mitigate risks, contractual measures to consider and procedural and legal steps that can be taken.

- Considering if third-party grant funding can reduce the risk, but also advising if the grant funding is causing a risk in itself.

- Advising on the contractual structure and contract contents that can mitigate risk.
- Advising on the merits of different OJEU/FTS notices and the risk/reward of their use to manage risk.
- For developers, how to construct a package before approaching a contracting authority in order to demonstrate either public procurement law does not

apply or, if it does, that an exemption can be relied upon or risks can be mitigated.

- For contracting authorities, how to best utilise the protections afforded in public procurement law to de-risk the contract by the time works begin.
- To advise on how to respond if a purported challenge is raised despite mitigation measures.

The Team



Roy Barry
**Partner, Head of the Manufacturing
and Supply Chain Sector**
E: roy.barry@brabners.com
T: 0161 836 8910
M: 07557 083 600



Michael Winder
Legal Director
E: michael.winder@brabners.com
T: 0151 600 3085
M: 07342 998 119